IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-212

HOYT C. CUPP, SUPERINTENDENT,
OREGON STATE PENITENTIARY,

Petitioner,

vs.

DANIEL P. MURPHY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITIONER AND BRIEF AS AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. AND THE OREGON CHAPTER OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.

ALAN S. GANZ, ESQ.,
Secretary-Treasurer,
FRANK CARRINGTON, ESQ.,
Executive Director,
Americans for Effective Law Enforcement, Inc.,
Suite 960,
State National Bank Plaza,
Evanston, Illinois 60201.

Of Counsel.
RONALD E. SHERK, ESQ.,
Executive Director,
Oregon Chapter
Americans for Effective
Law Enforcement, Inc.,
708 Main Street,
Oregon City, Oregon 97045,
FRED E. INBAU, ESQ.,
Professor of Law,
Northwestern University
School of Law,
Chicago Avenue and
Lake Shore Drive,
Chicago, Illinois 60611.

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITIONER.

Americans for Effective Law Enforcement, Inc. and the Oregon Chapter of Americans for Effective Law Enforcement, respectfully move this Court for leave to file a brief, *amici curiae*, in support of the petitioner in the instant case. This motion is made under Rule 42 of the Supreme Court Rules. The petitioner has consented to our filing; the respondent has refused to consent to our filing, consequently we are moving the Court directly for leave to file. Letters from counsel for the petitioner and respondent have been lodged with the Clerk of this Court. The interest of the *amici curiae* and our reasons for desiring to file are set forth below.

INTEREST OF THE AMICI CURIAE AND OUR REASONS FOR DESIRING TO FILE IN THE INSTANT CASE.

I. Interest of the Amici Curiae.

Americans for Effective Law Enforcement, Inc. (AELE), is a national, not-for-profit, non-partisan, non-political organization incorporated under the laws of the State of Illinois. AELE has received a tax exempt ruling from the Internal Revenue Service as an educational corporation. As stated in its by-laws, the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

AELE believes that one of the most effective means of accomplishing these purposes is through the filing of briefs, *amicus curiae,* in cases of crucial significance with regard to the enforcement of the criminal law. In its *amcius* advocacy AELE seeks to represent the concern of the average citizen with the problems of crime and lawlessness in this country and to represent the desire of the vast majority of our citizens for effective law enforcement, commensurate with the protection of the rights of individuals. We further seek to articulate to the courts the very

real practical problems which confront law enforcement officers in order that the courts may weigh such problems in deciding cases which will have a vital impact on the effectiveness of the law enforcement process as a whole.

As the 1967 Report of the President's Commission on Law Enforcement and Administration of Justice has pointed out:

> . . . many . . . decisions are made without the needs of law enforcement, and the police policies that are designed to meet those needs, being effectively presented to the court. If judges are to balance accurately law enforcement needs and human rights, the former must be articulated. They seldom are. Few legislatures and police administrators have defined in detail how and under what conditions certain police practices are to be used. As a result, the courts often must rely on intuition and common sense in judging what kinds of police action are reasonable or necessary, even though their decisions about the actions of one police officer can restrict police activity in the entire Nation. (Page 94.)

The articulation called for by the President's Commission is what AELE seeks to accomplish.

The Oregon Chapter of AELE is that state's affiliate with the national organization. The Oregon Chapter is not a separate legal entity but rather an organization of concerned citizens in Oregon, chartered by the national AELE, representing the concern of the citizens of that state. As the instant case arose in Oregon, the Oregon Chapter of AELE has a particular interest in its outcome.

2. Reasons for Desiring to File a Brief Amici Curiae in the Instant Case.

This case involves a search and seizure in the form of the warrantless taking of respondent's fingernail scrapings

by Portland police officers who were investigating the murder of respondent's wife. The state of Oregon must, of course, defend before this Court the legality of that particular search and seizure. We believe that the issues in the case transcend the question of the particular search and seizure and that they involve matters which are of major concern to the effectiveness of law enforcement in the United States.

The instant case involves police action taken to prevent the destruction or disposal of evidence which might be of vital significance in a murder case. Three courts have written opinions in this case. The Court of Appeals of Oregon[1] and the United States District Court for the District of Oregon[2] applied realistic common sense standards of judgment to the police conduct herein and upheld the search and seizure; the United States Court of Appeals for the Ninth Circuit[3] applied legalistic and hypertechnical standards of judgment to the police conduct and held the search to be illegal. The issue of what standards are to be applied by reviewing courts when they are judging police search and seizure conduct is inherent in this case and it is this issue to which we wish to address ourselves, for we believe the issue to be of major importance to law enforcement officers nationwide who are called upon to make search and seizure decisions on a daily basis.

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1. *State* v. *Murphy*, 465 P. 2d 900 (Or. App. 1970). Additionally in the instant case certiorari was denied by the Supreme Court of the United States, 400 U. S. 944 (1971).

2. Memorandum Opinion denying respondent's petition for a writ of habeas corpus. *Murphy* v. *Cupp*, U. S. D. C. Oregon, Civil No. 70-883, June 2, 1971.

3. *Murphy* v. *Cupp*, 461 F. 2d 1006 (9th Cir. 1972).

We therefore, respectfully move the Court for leave to file as *amici curiae*.

Respectfully submitted,

ALAN S. GANZ, ESQ.,
Secretary-Treasurer,
FRANK CARRINGTON, ESQ.,
Executive Director,
Americans for Effective Law Enforcement, Inc.,
Suite 960,
State National Bank Plaza,
Evanston, Illinois 60201.

Of Counsel.
RONALD E. SHERK, ESQ.,
Executive Director,
Oregon Chapter
Americans for Effective Law Enforcement, Inc.,
708 Main Street,
Oregon City, Oregon 97045,
FRED E. INBAU, ESQ.,
Professor of Law,
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INTEREST OF THE AMICI CURIAE.

Our interest has been set forth above at page 2 in our motion to file this brief as *amici curiae.*

ARGUMENT.

I. Reviewing Courts Should Apply Realistic, Commonsense Standards When Judging the Reasonableness of Police Search and Seizure Practices.

We will not reiterate at any length herein the arguments made by the State of Oregon, although we support them fully and associate ourselves with them. Our argument,

rather, is concerned with the extremely important policy question presented in this case: what standards should appellate courts use when they are called upon to judge whether or not a given search and seizure by law enforcement officers violated the Fourth Amendment's proscription against unreasonable searches and seizures.

The instant case presents the issue in sharp focus. On the one hand are the opinions of the Court of Appeals of Oregon and of the United States District Court for the District of Oregon which upheld as reasonable the warrantless taking of fingernail scraping from respondent, and which applied realistic non-technical, and commonsense standards in so finding. On the other hand is the opinion of the United States Court of Appeals for the Ninth Circuit which held the same search to be unreasonable and which, in a one page, *per curiam* opinion applied technical and legalistic standards of judgment to the same search.

An analysis of the factual situation facing the police in this case and of the three opinions judging the police conduct in the context of that fact situation presents the issue squarely. Detectives of the Portland Police Department had probable cause to believe that respondent Murphy had murdered his wife.[4] the victim had been strangled and detectives investigating the killing had noticed throat lacerations and abrasions on her throat. According to the opinion of the Oregon Court of Appeals at least one of the detectives who was experienced in homicide cases: "knew that throat lacerations were frequently produced by fingernails and that evidence in the form of blood skin and fibers could sometimes be found under the fingernails of assailants in such cases." 465 P. 2d at 904.

4. The Oregon Court of Appeals held: "At the time the police took fingernail scrapings they had probable cause to believe that the defendant was guilty of strangling his wife." 465 P. 2d at 904. This finding was not disturbed by the Ninth Circuit. *Murphy* v. *Cupp*, 461 F. 2d 1006 (9th Cir. 1972).

Murphy, the suspect in the killing, arrived voluntarily at the Portland Police station where he was joined by two attorneys. One of the detectives noticed a dark spot on Murphy's hand which prompted him to think of taking fingernail scrapings from Murphy. Murphy at first refused to permit the taking of the scrapings but the police took the scrapings over the objection of Murphy and his counsel. From the record no force or violence was used. Murphy had not been formally arrested at the time the fingernail scrapings were taken and no warrant was secured prior to their taking. The fingernail scrapings were introduced into evidence against Murphy at his trial for the murder of his wife and he was convicted of second degree murder.

Against this factual background we consider the diametrically opposed approaches which the Oregon Court of Appeals and the Ninth Circuit took in judging whether the warrantless taking of the fingernail scrapings was reasonable. The Ninth Circuit, in finding the search unreasonable, summarily dismissed the contention that exigent circumstances existed which would excuse the failure of the police to procure a search warrant. 461 F. 2d 1006. It is this summary treatment of that issue which, we submit, evidences a legalistic and hypertechnical standard by which the Court measured the police conduct involved, a standard which completely disregards the realities of the situation confronting the police officers.

What were the realities of the situation? Once the detectives had asked Murphy for permission to take fingernail scrapings they were committed, and Murphy was alerted that potentially damaging evidence against him was currently on his person. If, as the jury found, he was, in fact, guilty of strangling his wife; he might well have recalled the fact that he had scratched her, and he was then in a position to fear that traces of her skin or blood were embedded under his fingernails. We use, in common par-

lance, the idiom "at his fingertips" to indicate that something is readily accessible; evidence that could be vital in a murder case was literally "at Murphy's fingertips"—readily accessible to be disposed of.

Now, Murphy undoubtedly knew this, and the detectives, knew that he knew it. Their position, once they had asked Murphy's permission to take fingernail scrapings and alerted him to the existence of this evidence, was such that they either had to take the scrapings at once or risk the loss of this evidence, for Murphy who was not under arrest at the time, could have:

(1) bitten all of his nails off and swallowed them,

(2) cut his nail,

(3) scraped his nails with the nails of his other fingers,

(4) scraped his nails with some object, or

(5) washed his hands and scrubbed his nails, while a search warrant was being secured.

In other words, the loss of the evidence was in fact imminent, and when the situation confronting the police is viewed realistically this threatened loss of possibly vital evidence clearly created an exigency.[5]

The Ninth Circuit simply refused to consider the realities of the situation and imposed, rather, a rigid, technical standard of measurement by which to judge the actions of the police. This attitude is in sharp contradistinction to that of the Oregon Court of Appeals and that of the United States District Court for the District of Oregon. The Oregon Appeals Court summed up the situation facing the officers succinctly and, we emphasize, realistically:

> Unless the defendant were bound, manacled, guarded or by some other means placed in a position where he could not clip his fingernails, scrape the nails of one hand with nails of another, put his fingers in his

5. *See: Schmerber* v. *California*, 384 U. S. 757 (1966).

> mouth or go to the lavatory from the time the police asked him for permission to take fingernail scrapings until the time that they sought and obtained a warrant, *it was entirely likely that the evidence would have been destroyed in the interim.* Proper application of the Fourth Amendment does not require such extremes. The search of the defendant did not violate his constitutional rights to freedom from unreasonable search and seizure.[6] (emphasis added).

The U. S. District Court for the District of Oregon in denying respondents petition for a writ of habeas corpus, applied the same commonsense standard:

> I agree with the reasoning of the unanimous opinion in the Oregon Court of Appeals. The investigating officers had probable cause either to get a search warrant or arrest Murphy. Instead, they merely obtained fingernail scrapings, *which Murphy could have destroyed easily if given the opportunity.*[7] (emphasis added)

This Court, in granting *certiorari* in the instant case has agreed to review the legality of the particular search and seizure involved; however, we submit, that this Court will, in addition, be reviewing the issue of what standards appellate courts should use in judging search and seizure questions: commonsense and realistic or narrow and hypertechnical. We urge the Court, by reversing the judgment of the U. S. Court of Appeals for the Ninth Circuit, to resolve the conflict inherent in the lower courts' opinions in favor of the non-technical, realistic standard.

This Court has long held that in deciding the issue of probable cause to make an arrest or search commonsense standards are to be applied. Thus in *Brinegar* v. *United States,* the Court stated:

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6. 465 P. 2d at 905.

7. Memorandum Opinion: *Murphy* v. *Cupp,* U. S. D. C. Ore., Civil No. 70-883, June 2, 1971.

> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and 175 (1948).[8]

In the instant case the issue is not so much one of probable cause, as such, but rather one of the reasonableness of the conduct of police officers, with probable cause, in making a warrantless search—the taking of fingernail scrapings when the destruction or disposal of evidence by the defendant was in all likelihood imminent. We submit, that ". . . the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act . . ." standard announced in *Brinegar* (supra) for dealing with the question of probable cause should be the standard set by this Court for lower courts to follow when any aspect of police conduct is under consideration.

This argument in no way suggests that the police be given *carte blanche* in their activities. Police conduct must comport with the limitations set upon it by the law and judicial review of police conduct is an integral part of the law of this country. Our argument addresses itself solely to the *manner* in which such judicial review is to be brought to bear upon police conduct. Policemen, especially in the area of search and seizure, make the myriad decisions upon which to base their actions and such decisions are made in real life, not in ivory towers. We urge herein only that real life standards be used to measure the reasonableness of such decisions.

We believe that the most compelling policy reasons dictate this. That crime is now one of the most pressing domestic problems is, we believe, so obvious as not to require extensive citations of authority. One set of statistics, however, may well make our point. The murder in-

8. See also *United States* v. *Harris*, 403 U. S. 573 (1971); *Adams* v. *Williams*, 407 U. S. 143 (1972).

volved in this case took place in 1967; in that year there were 12,090 homicides in the United States.[9] In the year 1971 there were 17,630 homicides in the United States, an increase of 5,540 killings in five years.[10] We do not argue that any crise rise, no matter how precipitate, would justify the suspension of our constitutional guarantees of civil liberties. We do argue, however, that, in the face of the increase in crime and violence in this country, when the actions of our thinly-stretched peace forces come under judicial scrutiny, that scrutiny be brought to bear in a realistic and commonsense manner.

In summary, then, we urge this Court to hold in the context of the instant case, that a realistic standard of judgment be applied to police activities. This case is a classic example of such a need: the police were investigating a brutal murder and they had ample probable cause to believe that Murphy was involved. Murphy had his rights protected in every way and in fact had counsel present when the search was made. The police were in no way abusive and their action in taking the fingernail scrapings, from everything that the record shows, was prompted by a very commonsense belief that, had they not taken the scrapings when they did, any evidence under Murphy's nails would soon disappear.

The facts of this case are typical of thousands of similar situations which daily confront the police of this nation. Reason and public policy urge that when such situations come before reviewing courts a non-technical, commonsense and realistic standard of judgment be applied. This Court sets the tenor of lower court jurisprudence. In this case we urge that a mandate issue to lower Courts to turn to realistic rather than legalistic methods of judgment of police conduct.

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9. FBI Uniform Crime Reports 1967.

10. FBI Uniform Crime Reports 1971.

II. The Possibility of the Destruction or Disposal of Evidence Creates an Exigency Which Permits a Warrantless Search, and Analogy to Other Decisions of This Court Indicates That the Search in This Case Should Be Upheld.

There is ample legal authority that the possibility of the destruction or disposal of evidence creates an exigency which permits a warrantless search. Mr. Justice Brennan writing for the majority in *Schmerber* v. *California*, 384 U. S. 757, 770 (1966), which upheld the legality of the taking of a blood sample from a drunk driving suspect, stated:

> The officer in the present case, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.' *Preston* v. *United States*, 376 U. S. 364, 367.

We submit that the above language is the key to the instant case and that the taking of fingernail scrapings in an attempt to determine whether a suspect had committed murder is no less an emergency than the taking of blood allowed in *Schmerber* to test for the percentage of alcohol in the blood.

This Court, in *Schmerber*, concluded that an officer was not required to obtain a search warrant before a test for blood alcohol content was made and reasoned "that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." 384 U. S. at 771.[11] The facts in the case at bar present a situation wherein a suspect could, voluntarily and in a matter of seconds, have destroyed the probable evidence beneath his fingernails if given the opportunity; and, whereas it takes hours for alcohol to be

11. See also *State* v. *Findlay*, 145 N. W. 2d 650 (Iowa 1966).

eliminated from the blood, a process over which the individual has no control, fingernail debris can be eliminated not only speedily, but at will.

Further support for upholding the taking of fingernail scrapings under the circumstances heretofore recited is found by analogy to cases involving fingerprints and palm prints. This Court's decision in *Davis* v. *Mississippi*, 394 U. S. 721 (1968) examined issues similar to those at bar, however the facts are distinguishable.

In *Davis* the police investigating a rape discovered fingerprints on the victim's window sills. Faced with no other lead, the police rounded up some 24 Negro youths, without warrants, and took them to police headquarters for fingerprinting after which they were released. Davis was among those rounded up and his fingerprints matched those at the rape scene. This Court overturned Davis' rape conviction since probable cause was lacking and "Detentions for the sole purpose of obtaining fingerprints are no less subject to the constraints of the Fourth Amendment." *Davis, supra,* at 727. *Davis* v. *Mississippi*, is clearly distinguishable from the instant case: (1) the instant case did not involve a "dragnet" type of operation (2) the police had probable cause to believe that Murphy had incriminating evidence under his fingernails, and (3) the evidence in the instant case could easily be destroyed.[12]

The majority opinion in *Davis* set forth factors which differentiate fingerprint detentions from the usual arrest and search situation:

> Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fingerprinting involves none of the probing into an individual's

12. In *Davis*, Mr. Justice Brennan observed that because fingerprints cannot be destroyed, the detention need not come at an inconvenient time and therefore the need for a warrant before detention seemed to lack an exception. 394 U. S. at 727.

> private life and thoughts that marks an interrogation or search. Nor can fingerprint detention be employed repeatedly to harass any individual, since the police need only one set of each person's prints. Furthermore, fingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper lineup and the 'third degree.' 394 U. S. at 727.

We submit that the same factors can be used to uphold the legality of taking fingernail scrapings in cases such as this one.

A recent opinion of the Colorado Supreme Court relied upon this Court's decision in *Davis* to allow the warrantless palm printing of a murder suspect. *See, Early* v. *People,* 496 P. 2d 1021 (Colo. 1972).

The warrantless search based on probable cause of a movable vehicle stopped on a highway has been approved by this Court.[13] The rationale for sustaining such searches is that it is not practicable to secure a warrant since the vehicle car be quickly moved out of the locality in which the warrant must be sought. A similar rationale applies to the taking of fingernail scrapings, as the evidence can be quickly removed from under the fingernails. Indeed we believe fingernail scraping under such circumstances presents a stronger case for dispensing with a warrant, because the destruction of evidence in fingernail cases can be so speedily accomplished.

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13. *Chambers* v. *Maroney,* 399 U. S. 42 (1970) and *Carroll* v. *United States,* 267 U. S. 132 (1925).

CONCLUSION.

This is a case involving police conduct which was clearly reasonable under the circumstances when measured by ". . . the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. *Brinegar* v. *United States, supra.* We submit that this should be the standard by which police search and seizure conduct, particularly when exigent circumstances exist, should be judged.

We therefore urge this Court to reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted:

ALAN S. GANZ, ESQ.,
Secretary-Treasurer,
FRANK CARRINGTON, ESQ.,
Executive Director,
Americans for Effective Law Enforcement, Inc.,
Suite 960,
State National Bank Plaza,
Evanston, Illinois 60201.

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708 Main Street,
Oregon City, Oregon 97045,
FRED E. INBAU, ESQ.,
Professor of Law,
Northwestern University
School of Law,
Chicago Avenue and
Lake Shore Drive,
Chicago, Illinois 60611.